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No. 90-39

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD C. FRAZIER,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On October 13, 1988, petitioner was indicted by a Medina County Grand Jury for two counts of rape, in violation of Ohio Revised Code 2907.02, one count of gross sexual imposition, in violation of Ohio Revised Code 2907.05, and sexual battery, in violation of Ohio Revised Code 2907.03. The charges arose as a result of the petitioner allegedly compelling his minor step-daughter to engage in various sexual conduct and sexual contact. Based upon the fact that the victim/step-daughter had a child in 1988 which may have been fathered by the petitioner, the State of Ohio sought to have a blood sample taken for the purpose of D.N.A. analysis. After a hearing was held on the issue, the trial court judge ordered that the blood sample be taken (Appendix A).

Petitioner filed a notice of appeal from that order to the Ninth District Court of Appeals, Medina County, Ohio. The State of Ohio filed a motion to dismiss the appeal as not affecting a substantial right and, therefore, not a final appealable order pursuant to Ohio Revised Code 2505.02. The appeals court agreed and the appeal was dismissed (Petitioner's Appendix C). A motion for reconsideration of that decision was also denied (Petitioner's Appendix D).

Thereafter, an appeal was taken to the Ohio Supreme Court, with memoranda filed in support of and opposing jurisdiction. That appeal was dismissed sua sponte "for the reason that no substantial constitutional question exists therein" (Petitioner's Appendix B). The matter is now before this court upon petitioner's assertion that the withdrawal of a blood sample is an unreasonable search and seizure in violation of the Fourth Amendment.

REASONS WHY PETITION SHOULD BE DENIED

Petitioner's writ should be denied because petitioner has not asserted any of the following:

That the decision rendered in this case was made by a federal court of appeals which is in conflict with another federal court of appeals or with a state court of last resort, or that the decision so far departed from the accepted and usual course of judicial proceedings;

That the decision rendered in this case involves a federal question in a way which conflicts with the decision of another state court of last resort or a federal court of appeals;

That the decision rendered in this case involves an important question of federal law which has not been settled by this court or in a way which conflicts with applicable decisions of this court.

That the decision rendered in this case involves a federal question in a way which conflicts with the decision of another state court of last resort or a federal court of appeals;

That the decision rendered in this case involves an important question of federal law which has not been settled by this court or in a way which conflicts with applicable decisions of this court.

Petitioner's argument has shifted somewhat from an alleged claim that the mere taking of a blood sample would violate his privilege against self-incrimination, as protected by the Fifth Amendment, to an alleged illegal seizure proscribed by the Fourth Amendment.

This Court has held that the Fifth Amendment privilege against self-incrimination, as made applicable upon the states by the Fourteenth Amendment, protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis thereof does not involve compulsion to these ends. Likewise, the Court has recognized that the systematized or scientific analyses of the accused's fingerprints, *blood samples*, clothing, hair, and the like, could not be properly characterized as critical stages of the prosecution at which the accused even has the right to the presence of his counsel. *Schmerber v. California*, 384 U.S. 747, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

In *Ohio v. Biddings* (October 14, 1988), Franklin County App. No. 88 AP-910,[1] the court recognized that the mere taking of an accused's blood sample may affect a "substantial right" because it could violate the constitutional right of religious freedom. Hence, such an order is subject to appellate review as a final appealable order. However, petitioner has made no assertion that the taking of his blood sample would violate his religious freedom. Instead, his Fifth Amendment argument hinges upon the prospective use of the sample's results as a violation of his right against self-incrimination. *Biddings*

[1] Appendix B.

acknowledges that this question concerned the admissibility of the sample's results, but was not a final appealable order. Accordingly, the mere taking of petitioner's blood sample for the purpose of D.N.A. analysis is no different than fingerprints, clothing, hair, etc., and has no Fifth Amendment implications.

Turning to petitioner's claim that the mere taking of a blood sample would violate his Fourth Amendment right to be free from unreasonable searches and seizures, he cites this Court's three part test enunciated in *Winston v. Lee,* 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). In balancing those three factors, it becomes clear that the withdrawal of blood is a reasonable intrusion which would not threaten the safety or health of the petitioner. The extent of the intrusion is minimal and does not involve the administration of general anesthesia or an incision beneath the skin. Consequently, there is no significant health threat in the withdrawal of blood. Finally, the state has a compelling interest to justify taking petitioner's blood sample. The results of the analysis may conclusively establish the fact that petitioner had sexual intercourse with his minor step-daughter at a certain period in her life. While such evidence is no doubt damaging to the petitioner, it is nonetheless reasonable under the Fourth Amendment.

The state contends that the standard for review in this case is no different than any other case involving a search or seizure. That is, whether there is probable cause to believe that evidence may be found, the petitioner's reasonable expectation of privacy, and the state's compelling need to obtain the evidence. In balancing those considerations, the trial court properly ordered the blood sample in question. The merits of D.N.A. testing are irrelevant to the constitutional issues presented by the petitioner.

CONCLUSION

For the reasons expressed above, the State of Ohio respectfully opposes petitioner's writ of certiorari and requests that it be denied.

Respectfully submitted,

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APPENDIX A

JOURNAL ENTRY
OHIO COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS

MEDINA COUNTY, OHIO

CASE NO. 9323

STATE OF OHIO,
Plaintiff,

vs.

RICHARD FRAZIER,
Defendant.

JOURNAL ENTRY

JUDGE JUDITH A. CROSS

This matter came on for hearing on the State's motion for a blood sample on August 28, 1989, before the Honorable Judith A. Cross, Judge of the Court of Common Pleas, Medina County. The Prosecuting Attorney was in court on behalf of the State of Ohio and the Defendant was in court and represented by Edmond F. Bowers.

The Court heard all the arguments of counsels and orders a blood sample be taken for DNA analysis. Also an additional or separate sample be set aside for defendant to use for his own submission or analysis.

IT IS SO ORDERED.

JUDGE JUDITH A. CROSS

COMMON PLEAS COURT
89 SEP 3 AM 11:29
FILED
JEAN WATERS
MEDINA COUNTY
CLERK OF COURTS

APPENDIX B

OPINION
OHIO COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 88AP-910
(ACCELERATED CALENDAR)

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROBERT BIDDINGS,
Defendant-Appellant.

OPINION

Rendered on October 14, 1988

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellee.

MR. JAMES KURA, Public Defender and MS. BARBARA J. SLUTSKY, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

MCCORMAC, *J.*

Robert Biddings, defendant-appellant, appeals the trial court's order requiring the taking of his blood to have it tested for DNA and compared to samples taken from rape victims. Defendant contends that the trial

court's order is a final appealable order and that the order deprives him of his individual freedom to practice his religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution, and Section 7, Article I of the Ohio Constitution.

The first issue is whether the order of the trial court, refusing to quash the search warrant which permits the state to take a blood sample from the person of defendant, is a final appealable order. In deciding this question, we note that the issue is not the admissibility of evidence obtained as a result of the execution of the search warrant but, instead, whether defendant's constitutional rights to freedom of religion will be violated by the mere taking of a blood sample from him. If the question were solely the admissibility of the evidence, the order of the trial court would not be appealable at this stage since there would be adequate opportunities for defendant to contest any ruling concerning the use of the evidence after conviction. However, the contention of defendant is that the mere taking of the samples constitutes the violation of his religious freedom rather than any use that may be made of the samples. Hence, if that were true, no later appeal would be effective to remedy the violation that had already taken place.

R.C. 2505.02 defines a final order as "*** an order that affects a substantial right made in a special proceeding ***." Defendant has a substantial as well as a constitutional right to practice his religion according to his tenets and not to have the state violate those rights. See *In re Milton* (1987), 29 Ohio St. 3d 20. To determine whether an order was issued in a special proceeding, we must weigh the harm to the prompt and orderly disposition of the litigation and the waste of judicial

resources because of possible multiple appeals against the need for immediate review because an appeal after final judgment is not practical. See *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253. As previously noted, there is no effective way to remedy a violation of defendant's freedom to practice his religion without government intervention if the violation has irreparably taken place prior to an opportunity to appeal. Hence, applying the *Amato* balancing test, we find that there is a final appealable order of the issue of whether defendant has demonstrated that the execution of the search warrant will violate his constitutional right of religious freedom.

The state may obtain blood from a defendant by execution of a search warrant against the defendant's wishes where there is probable cause to believe that evidence relating to a crime will be found therein. *Schmerber v. California* (1966), 384 U.S. 757. Hence, facially the search warrant is valid as the affidavit upon which it is based states ample grounds for a reasonable magistrate to believe that the blood sample taken from defendant may produce evidence of a crime. In regard to the facial validity of the search warrant, it is not significant that there may be other methods by which evidence of a crime may be found. However, defendant asserts a matter not asserted in *Schmerber* which is that the mere taking of the blood sample would cause a violation of his religious belief and the freedom to practice his religion as he sees fit. The trial court scheduled a hearing to consider this matter. Although the defendant argued that the state had the burden to proceed, the state's burden was fulfilled by the showing that the search warrant complied with the dictates of *Schmerber*. The state was not required to prove that the taking of the blood samples would not interfere with

defendant's right to practice his religion. Indeed the state has no knowledge of defendant's subjective religious belief. Thus, the defendant had the burden to show that the taking of the blood sample would violate his religious belief.

The defendant waived his right to be at the hearing and he did not testify. There was no testimony adduced at the hearing but only statements of counsel. It appears that there was an agreement that defendant is a member of the Jehovah's Witnesses, although he may not be active in that church at this time. It was also conceded that the Jehovah's Witness faith does not prohibit the taking of a blood sample. Hence, there was no necessity of evidence concerning these two matters. The issue then revolved around whether a person's individual religious belief, false or true, that is in complete odds with the beliefs held by the majority, if not all, of his religious order is sufficient to give rise to a constitutional right to practice his religion, if his views are sincerely held rather than merely being used as a ruse to avoid some undesirable consequence of actions proposed to be taken against him.

The case law supports the proposition that an honestly held religious belief, even one at odds with the majority or all of the members of the religious organization to which the person belongs, is entitled to constitutional protection. See *Thomas v. Review Bd. of Indiana Employment Security Div.* (1981), 450 U.S. 707; *Bacher v. North Ridgeville* (1975), 47 Ohio App. 2d 164. Thus, if defendant proved that he had an honestly held religious belief that prohibited the taking of blood samples from him, that belief is entitled to constitutional protection without inquiry into the truth of falsity of his view or whether he has correctly interpreted the Bible.

The defendant did not prove that he had an honestly held religious view that prohibited the taking of blood samples from him. He did not testify at the hearing; the only "evidence" at the hearing was counsel's statement that he had that view. Counsel's statements are not sufficient to carry defendant's burden in this regard where defendant choose not to place his credibility in issue by being subject to cross-examination. His claimed beliefs are suspect since they appear to be at complete variance with the religious order to which he claims to belong and there is a strong self-serving motivation to prevent the state from obtaining what might be the strongest possible evidence to convict him of numerous crimes. Thus, the trial court did not err in refusing to quash the search warrant because defendant failed to carry his burden to show that he had an honest belief that taking blood from him would violate his religious principles.

Following the trial court's determination, an affidavit was submitted by defendant that, in a conclusionary fashion, stated that he was religiously opposed to the taking of blood based on Genesis 9:5, 6 and that he had no religious objections to the taking of other physical samples. However, that affidavit was not properly before the trial court nor is it the basis for finding that the trial court erred in failing to set aside the search warrant. Defendant was not under cross-examination and subject to a determination of whether his claimed religious beliefs were honestly held.

The inquiry is not over even if an honestly held religious belief against certain state action is proved. The First Amendment to the United States Constitution, which guarantees the freedom of religion, encompasses two aspects: the freedom to believe and the freedom to

act. The freedom to believe is absolute, but the freedom to act is not. One's relation to God and the obligations that he may believe that they impose and the manner in which he expresses those beliefs cannot be interferred with provided that there is no interference with the morals of the people and the laws of society designed to secure us peace and prosperity. *United States v. Ballard* (1944), 322 U.S. 78.

Applying the *Ballard* principles, courts have held that blood tests may be ordered against claims of personal religious beliefs when the state has a compelling and paramount interest. Generally the cases in which that doctrine has been applied involved paternity proceedings. See Annotation (1985), 37 A.L.R. 4th 167; Annotation (1956), 46 A.L.R. 2d 1000, Section 6d supplement. See, also, *State v. Meachum* (Wash. 1980), 612 P.2d 795; *In the Matter of Martinez v. Anthony D.* (1983), 466 N.Y.S. 2d 194.

Even if we accept defendant's belated affidavit as evidence of his honestly held religious belief, that personally held viewpoint is insufficient to override the compelling state interest involved. The interest of the state in obtaining evidence to prove that defendant was involved in rape and other crimes of violence is great. There may even be a future interest of the victims to know who the perpetrator was given the latent possibility of disease that may stem from this type of contact. Certainly the state interest is at least as great as the interest of the state and the parties in determining the paternity of a child.

Defendant argues that DNA fingerprinting may be obtained by less intrusive ways that do not violate defendant's religious beliefs, such as use of other body tissues and fluids other than blood. The only evidence pertaining to this issue is the materials issued by Cellmark Diagnostic, the laboratory that was to perform the tests, which state that DNA fingerprinting can be accomplished from semen and other DNA bearing cells, as well as with blood. The record does not demonstrate whether DNA fingerprinting with blood is better or the same as can be accomplished with the use of other tissues or fluids, or whether the acceptability into evidence of DNA fingerprinting with blood is more likely than with other fluids. Expert testimony would be needed to show that effective, less intrusive means, are available. The unsworn and inconclusive brochure of Cellmark is insufficient for this purpose.

The trial court did not err in refusing to suppress the search warrant. Since the trial court has not placed an order on the record reflecting that ruling, that order should be entered immediately to make this appeal mature. This court's temporary stay of execution of the search warrant to resolve these important issues on appeal is dissolved, effective with entry of judgment. The trial court may order execution of the search warrant forthwith.

Judgment affirmed; stay of execution dissolved.

REILLY and BOWMAN, *JJ.*, concur.